

REMARKS

The present application was recently acquired by Tollgrade Communications, Inc. (hereinafter "Tollgrade") from the prior Assignee of record - Teradyne, Inc. (hereinafter "Teradyne"). Concurrent with the Assignment of the application to Tollgrade, responsibility for the present application was transferred to the attorneys associated with Customer No. 28289 via a Revocation Of Attorney With New Power Of Attorney And Change Of Correspondence Address dated March 25, 2008.

Turning now to the Office Action, the Information Disclosure Statement filed January 21, 2004 stands objected to for being of improper form. In addition, the Examiner makes a Requirement for Information under Rule 105 to provide information on the events described in the Information Disclosure Statement.

The Information Disclosure Statement includes statements regarding work of the present inventors prior to the filing of the above-identified application. These statements do not constitute documents that are amenable to listing on a PTO Form-1449 or Form PTO/SB/08A. The statements, however, are a sincere attempt to advise the Examiner of the work of the present inventors leading up to the present invention. Accordingly, Applicants respectfully request the Examiner make the Information Disclosure Statement of record in the application and acknowledge reviewing the statements made therein.

Turning now to the Requirement for Information, in response to this Requirement, the undersigned contacted in-house patent counsel for Teradyne. Copies of e-mail correspondence dated March 7th (Exhibit A) and March 14th (Exhibit B) to Mr. Chet Cekala (in-house patent counsel for Teradyne) are attached.

Following the March 14, 2008 e-mail, the undersigned received a telephone call from Mr. Cekala wherein he advised that Teradyne had no information responsive to the Requirement for Information and recommended contacting the prior outside counsel, Edmond J. Walsh, to discuss the Requirement for Information.

Thereafter, the undersigned contacted Mr. Walsh requesting any available information responsive to the Requirement for Information. During this conversation, Mr. Walsh advised that he had no additional information other than what was disclosed in the Information Disclosure Statement. Mr. Walsh also indicated that if any documented information regarding the statements made in the Information Disclosure Statement were available, that this information would have been included in the file for the application that

was transferred to the undersigned's firm. Mr. Walsh, further advised that the purpose of the statements in the Information Disclosure Statement was to establish that the present invention was not in public use or on sale before the filing of the application.

Upon careful review of the transferred file, the accompanying handwritten notes (Exhibit C) dated 9-9-03 were identified. Starting on the fourth page of these handwritten notes, there appears notes regarding the NetFlare product and "Telesys".

As best understood, the handwritten notes contain information regarding the statements made in the Information Disclosure Statement. However, it is not clear how the information in the handwritten notes specifically relates to the statements made in the Information Disclosure Statement. Nevertheless, the handwritten notes are submitted herewith in response to the Requirement for Information as these notes represent the only information known to the undersigned regarding the statements made in the Information Disclosure Statement.

Regarding the statements on page 3 of the Information Disclosure Statement that an upgrade including the throughput measurement technique was provided to Telus in July of 2003 and that some time after September 30, 2002 and before December 31, 2002 the inventors adapted the time-based throughput measurement technique to be more similar to one provided in Telus, while dates around these time periods appear on page 4 and 5 of the handwritten notes, it is not clear without speculation where the dates in the Information Disclosure Statement originated.

A Google search for "NetFlare Teradyne" produced, among other things, the articles of Exhibits D and E regarding the deployment of the NetFlare product with Telus in 2001. As presently understood, other than the statements made in the Information Disclosure Statement, no further information regarding the upgrade to the NetFlare product deployed at Telus is available.

Applicants' representative has made a sincere attempt to reply to the Requirement for Information. It is genuinely believed that no further information other than the accompanying Exhibit C and what is disclosed in the Information Disclosure Statement is available.

Claim 2 stands rejected under 35 U.S.C. § 112, second paragraph, for indefiniteness. It is believed that the foregoing amendment to claim 2 overcomes this rejection.

Claims 1-27 stand rejected under 35 U.S.C. § 101 as being directed to non-statutory subject matter. It is believed that the foregoing amendments to independent claims 1, 10 and 21 overcome this rejection.

Claims 1-9 stand rejected under 35 U.S.C. § 102(e) for anticipation by U.S. Patent No. 6,711,137 to Klassen et al. Claims 10-27 stand rejected under 35 U.S.C. § 103(a) for obviousness from the teachings of the Klassen et al. patent in view of U.S. Patent No. 6,654,914 to Kaffine et al. In the rejection of independent claims 10 and 21, the Kaffine et al. patent is relied upon only for its allegedly disclosing presenting a diagnostic web page to the user.

In response to the rejection of the claims under 35 U.S.C. §§102(e) and 103(a), independent claims 1, 10 and 21 have been amended to include the limitations of claim 4; claim 4 has been cancelled; claim 5 has been amended to depend from claim 1 instead of cancelled claim 4; claims 15 and 17 have been amended to improve their form and claims 22-25 have been amended to correspond to the amendment to claim 21.

As amended herein, claim 1 recites a method of measuring the throughput of a network. The method includes (a) transmitting a block of data over the network, wherein the size of the block of data is selected to fit within a network packet; (b) measuring a value representative of the transmit time of the block; (c) computing the data transmission rate of the block; (d) repeating steps (a), (b) and (c) until a stop event occurs, wherein the stop event is the first to occur of transmitting a number of blocks or the passage of an amount of time; (e) computing the network throughput by averaging the data transmission rates of selected ones of the blocks; and (f) outputting the computed network throughput.

In the rejection of the limitations of claim 4 included in step (a) of claim 1, the Examiner alleges that the Klassen et al. patent, column 4, lines 6-16 discloses that the size of the block of data is selected to fit within a network packet. Column 4, lines 6-16 of the Klassen et al. patent read as follows:

In accordance with the invention, a system and method is provided for evaluating a communications network. A plurality of network evaluation signals, or probative test packets, are selectively sent and received through the network. Responsive to these evaluation signals, selective network evaluation parameters are determined and stored. Queuing theory analysis, responsive to these parameters, determines the response time and throughput characteristics, including capacity, utilization and performance, of the network.

As can be seen, column 4, lines 6-16 of the Klassen et al. patent disclose sending and receiving network evaluations signals or probative test packets through a network and, hence, selectively determining network evaluation perimeters. However, nowhere does this section of the Klassen et al. patent disclose, teach, suggest, or imply that the size of the block of data sent over the network is selected to fit within a network packet. The remainder of the Klassen et al. patent does not cure this deficiency in this section of the Klassen et al. patent.

Assuming *arguendo* that the Klassen et al. patent discloses transmitting a number of blocks of data over a network, measuring a value representative of transmit time and computing a data transmission rate of each block, the Klassen et al. patent does not disclose, teach or suggest that each block of data is selected to fit within a network packet. To this end, there is no recognition in the Klassen et al. patent of the relationship between the size of the block of data and the size of the network packet on the network throughput. To this end, the Klassen et al. patent is not concerned that the size of the block of data fit within the network packet. Rather, the Klassen et al. patent discloses the need for the complex calculations disclosed in the four routines appearing in columns 17 and 18 of the Klassen et al. patent. To this end, it is believed that had the inventors in the Klassen et al. patent realized that simply limiting the size of the block of data to fit within a network packet, the extensive calculations disclosed throughout the Klassen et al. patent, especially columns 17 and 18 thereof, could have been avoided in view of simply averaging the data transmission rates of selected ones of the blocks of data as set forth in step (e) of claim 1.

Absent disclosing, teaching or suggesting a method having all the limitations of claim 1, the Klassen et al. patent cannot anticipate or render obvious claim 1, or claims 2-9 dependent therefrom.

Regarding the rejection of independent claims 10 and 21 under 35 U.S.C. § 103(a), as noted above, the Examiner relies upon the Klassen et al. patent as the primary reference and relies on the Kaffine et al. patent only for its disclosing presenting a diagnostic web page to the user. For the reasons discussed above in connection with claim 1, the Klassen et al. patent cannot anticipate or render obvious independent claims 10 and 21 of the present application. The Kaffine et al. patent, which is relied upon only for disclosing presenting a diagnostic web page to the user, does not cure the deficiencies in the teachings of the Klassen et al. patent.

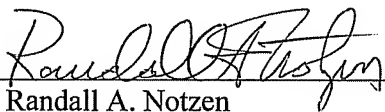
Absent disclosing, teaching or suggesting a method having all the limitations of claim 10 or a diagnostic unit operative in the manner of claim 21, the Klassen et al. and Kaffine et al. patents, either individually or in combination, cannot anticipate or render obvious independent claims 10 and 21 of the present application, or claims 11-20 and 22-27 dependent therefrom.

CONCLUSION

Based on the foregoing amendments and Remarks, reconsideration of the rejections and allowance of claims 1-3 and 5-27 are requested.

Respectfully submitted,

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